

SERVICE DATE - FEBRUARY 25, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION

Finance Docket No. 32518

THE PHILLIPS COMPANY--PETITION FOR DECLARATORY ORDER

Decided: February 14, 1997

By petition filed July 11, 1996, The Phillips Company (Phillips) requests that this proceeding be reopened and treated as an application under 49 U.S.C. 10903 for "prospective adverse abandonment" of a rail line. Phillips' petition is joined by two landowners of property abutting the subject line of railroad, T. Gregory Kirianoff and Patricia Kirianoff.² For the reasons discussed below, the request will be denied.

BACKGROUND

On May 3, 1994, Phillips filed a pleading entitled "Application For Determination of Abandonment," requesting the ICC to find that The Denver & Rio Grande Western Railroad Company (DRGW) had, by 1985, abandoned service over its Aspen Branch between milepost 375, near Carbondale, CO, and milepost 392, near Woody Creek, CO, a distance of 17.5 miles. The proceeding was originally docketed as AB-8 (Sub-No. 28), The Phillips Company--Abandonment--A Line of the Denver & Rio Grande Western Railroad Company, and identified as a third party or "adverse" abandonment

¹ The ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803 (1996), abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10903.

² The Kirianoffs previously filed a notice of exemption in STB Docket No. AB-12 (Sub-No. 190X), Southern Pacific Rail Corporation--Abandonment Exemption, claiming that the Aspen Branch qualified under the abandonment class exemption for out-of-service rail lines at 49 CFR 1152 Subpart F--Exempt Abandonments. In a decision served April 3, 1996, the Board's Director of the Office of Proceedings rejected the Kirianoffs' exemption notice on the grounds that the Board is precluded from using the exemption authority to grant adversarial abandonments or discontinuances. The Board affirmed the Director's decision by decision served June 10, 1996. Both decisions emphasized that the Kirianoffs can file a formal application under 49 U.S.C. 10903 if they wish to pursue the abandonment.

application.³ Because Phillips sought a finding that a de facto abandonment by DRGW had occurred prior to October 1988,⁴ the ICC determined, in a decision served August 26, 1994, that the proceeding was not intended to be, and could not be considered, an abandonment application. Accordingly, the agency re-docketed the proceeding as Finance Docket No. 32518 and processed it as a petition for declaratory order.

Consistent with the evidentiary schedule for the declaratory order, Phillips and DRGW filed statements supporting their respective positions. By decision served April 18, 1995, the ICC denied Phillips' requested relief, finding that DRGW had not obtained ICC approval to abandon the Aspen Branch and that an abandonment could not occur without that approval. As a result, the ICC found that the issue of whether a de facto abandonment occurred before October 1988 was moot and need not be decided. The proceeding was discontinued on the decision's service date. Phillips filed its petition to reopen 15 months later.⁵

DISCUSSION AND CONCLUSIONS

Phillips' petition will be denied. Under the Board's Rules of Practice, an administratively final decision may be reopened only upon a party's showing of new evidence, changed circumstances, or material error. 49 CFR 1115.4. Phillips does not allege, much less demonstrate, that its petition meets any of these standards.

The relief that Phillips now seeks, i.e., a finding that the abandonment of DRGW's Aspen Branch should be authorized under section 10903, is both substantively and procedurally different from the relief it previously sought.⁶ Therefore, the filing of a new application is required. The issue in the declaratory order proceeding was whether a rail line could lawfully be abandoned outside the jurisdiction of the ICC or the Board. The

³ As under the law, an application may be made to the Surface Transportation Board by anyone that the Board make a finding under section 10903 of the ICCTA that a rail carrier be permitted to abandon a particular line of railroad. These applications are usually called "third party" applications because they are made by a person other than the railroad that owns the line. They are also called "adverse" applications because they are usually opposed by, and are therefore adverse to the interests of, the railroad that owns the line.

⁴ Phillips acknowledges that an October 1988 amendment to the National Trails System Act--section 1248(c)--gives reversionary title in abandoned rights-of-way to the United States, rather than to adjacent landowners. Phillips' position throughout this proceeding is that section 1248(c) does not apply because DRGW abandoned the Aspen Branch before the effective date of the amendment.

⁵ After DRGW filed its statement in opposition to Phillips' petition, Phillips submitted a response on August 12, 1996. DRGW moves to strike this response as an impermissible reply to a reply. DRGW's motion will be granted.

⁶ Indeed, the current remedy sought by Phillips is inconsistent with its prior claim of de facto abandonment.

Board decided that issue in that proceeding. Phillips cannot now reopen that administratively final proceeding to litigate an entirely new and different issue.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition to reopen is denied without prejudice to Phillips filing a formal application for abandonment of the Aspen Branch under 49 U.S.C. 10903 following the precedent in Modern Handcraft Abandonment, 363 I.C.C. 969 (1981), for the filing of adverse abandonments and discontinuances.

2. DRGW's motion to strike Phillips' August 12, 1996 reply to a reply is granted.

3. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary